Supreme Court, U.S.
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No. 95-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

ELPIS SAKARIA *and* JACK AND LILLIAN HILLMAN
*Petitioners,*

*v.*

DARE COUNTY BOARD OF EDUCATION
*Respondent.*

**On Petition For Writ of Certiorari To The North Carolina Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

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10 pp

## QUESTION PRESENTED

Whether, consistent with the division of powers established by Article I and the Tenth Amendment to the United States Constitution, a state court may rely on a federal statute to expand state regulatory authority without express statutory authorization.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS ..... 2

STATEMENT ..... 2

REASONS FOR GRANTING THE PETITION ..... 8

BASIC PRINCIPLES OF FEDERALISM DEMAND REVIEW OF NORTH CAROLINA'S UNCRITICAL RELIANCE ON FEDERAL LAW TO EXPAND STATE REGULATORY AUTHORITY ..... 8

*I. The North Carolina Courts Erroneously Assumed That Federal Policy Enlarged The Board's Regulatory Power* ..... 10

*II.* *The Lower Courts' Conclusion That Federal Policy* Ipso Facto *Expands State Power Undermines The Basic Structure Of Our Federal System* . . . . . 13

CONCLUSION . . . . . 19

## TABLE OF AUTHORITIES

**CASES**

*Dare County Bd. of Educ. v. Sakaria*, 456 S.E.2d 842 (N.C. Ct. App. 1995). . . . . 1

*Dare County Bd. of Educ. v. Sakaria*, 466 S.E.2d 717 (N.C. 1996). . . . . 1

*Gregory v. Ashcroft*, 501 U.S. 452 (1991). . . . . 2, 13, 19

*Highway Comm'n v. Matthis*, 163 S.E.2d 35 (1968). . . . . 6

*Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). . . . . 2, 7, 13, 18

*Michigan v. Long*, 463 U.S. 1032 (1983). . . . 2, 13, 15, 16

*New York v. United States*, 505 U.S. 144 (1992). . . . . 2, 7, 13-14, 18

*Oregon v. Hass*, 420 U.S. 714 (1975). . . . . 13, 16

**CONSTITUTIONAL PROVISIONS**

U.S. CONST. amend. X. . . . . 2, 8

U.S. CONST. art. II, § 1. . . . . 16

U.S. CONST. art. III, § 1. . . . . 16

**STATUTES AND REGULATIONS**

28 U.S.C. § 1257(a) (1995). . . . . 2

33 C.F.R. § 325.8(a) (1996). . . . . 11

33 U.S.C. § 1344 (1995). . . . . 2, 11

33 U.S.C. § 2317(a)(1) (1996). . . . . 11

N.C. GEN. STAT. § 115C-517 (1995). . . 2, 5-7, 10, 11, 14

Notice and Correction, 55 Fed. Reg. 9210 (1990) (Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army). . . . . 12, 14

**OTHER MATERIALS**

William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Question*, 78 CALIF. L. REV. 263 (1990). . . . . 16

Ginsburg, Book Review, 92 HARV. L. REV. 340 (1978) (reviewing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1st ed. 1978)). . . . . 16

Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484 (1987)(reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)). . . . . 13

SUP. CT. R. 10(c). . . . . 8

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**On Petition For Writ of Certiorari To**
**The North Carolina Supreme Court**

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## PETITION FOR WRIT OF CERTIORARI

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Elpis Sakaria and Jack and Lillian Hillman respectfully petition for a writ of certiorari to the North Carolina Supreme Court.

## OPINIONS BELOW

The judgment of the North Carolina Supreme Court is reported at 466 S.E.2d 717 (N.C. 1996). Pet. App. A. The opinion of the North Carolina Court of Appeals is reported at 456 S.E.2d 842 (N.C. Ct. App. 1995). Pet. App. B. The original opinion and corrected judgment (Pet. App. D) of the Dare County Superior Court are unreported.

## JURISDICTION

The judgment of the North Carolina Supreme Court was entered on February 9, 1996. Pet. App. A. A petition for rehearing was denied on April 3, 1996. Pet. App. 2d. On July 2, 1996, the Chief Justice extended the time for filing this petition to and including August 1, 1996. This Court has jurisdiction under 28 U.S.C. § 1257(a) (1995).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, sections 8 (granting Congress powers of taxation, borrowing, defense, the regulation of interstate commerce, and the general welfare), and 10 (forbidding states to enter foreign treaties; coin money; or enact bills of attainder, ex post facto laws, or laws "impairing the Obligation of Contracts"); and the Tenth Amendment (reserving to the states all power not delegated to the Federal Government) to the United States Constitution are set out at Pet. App. E.

Section 404 of the Clean Water Act, 33 U.S.C. §§ 1344(a), (d) and N.C. GEN. STAT. § 115C-517 (1995) are reprinted at Pet. App. F.

## STATEMENT

The United States Constitution expressly divides sovereign authority between national and state governments. *E.g.*, U.S. CONST. ART. I, §§ 8, 10; *id.* amend. X; *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). By ensuring that neither sovereign power fundamentally encroaches upon the other, that division promotes vitally important interests, including political

accountability and the uniformity and integrity of federal and state law. *See New York v. United States*, 505 U.S. 144, 169 (1992); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). The North Carolina courts—by decreeing that a school board may rely on federal regulations to condemn private property even though federal law does not expressly confer this authority—have blurred the division between federal and state power in an elemental way that only this Court can correct.

Respondent Dare County Board of Education (school board), is the local school board for Dare County, North Carolina. Pet. App. 3c. It operates the Cape Hatteras School (the school), a public school in Buxton, Dare County, North Carolina, that serves children from kindergarten through 12th grade. *Id.* The school sits on 18 acres, 17 acres less than the site standards set by the State of North Carolina (the state) and the Southern Association of Secondary Schools and Colleges (the association). Pet. App. 3c-4c. Despite the size of its campus, the school obtained accreditation from the state. The school, however, could not get accreditation from the association without enlarging its campus. *Id.*

In 1985 the school board investigated whether it could expand the school's site by constructing an athletic field on a 12.5 acre lot (owned by the board) just west of the academic campus. Pet. App. 2b-3b. Because 3.1 acres of the lot comprised wetlands, it fell within the jurisdiction of the United States Army Corps of Engineers and the North Carolina Department of Environment, Health and Natural Resources, Division of Coastal Management (Coastal Management). Pet. App. 3b. Construction of the athletic field, therefore, could

not begin until the board received permits from these state and federal agencies.

The school board's first permit application was denied in June 1988. Pet. App. 3b. Coastal Management rejected the application "because [the board's] proposal would result in an unacceptable loss of wetlands." *Id.* The board's second application was denied in 1992. *Id.*

In 1988, soon after Coastal Management rejected the board's first application, the school board formed an ad hoc committee to find land for the proposed athletic field. Pet. App. 4b. Throughout the site-selection process, the board was driven not only by state regulatory demands but by the ultimate need for federal approval. George Wood, an environmental consultant on the ad hoc committee, testified that "*the primary permit we had to achieve at that time was the Corps' approval under section 404 of the Clean Water Act.*" R.224 (emphasis added). To obtain that permit, the board (among other things) had to offer wetlands mitigation to offset any wetlands destroyed by the construction of the athletic field. Pet. App. 4b.

To satisfy the wetlands mitigation and other permit conditions, the board included property it did not then own in the third permit application. Pet. App. 3b. The application named six lots, surrounded by the Hatteras School property, owned by Petitioners Elpis Sakaria, a widowed American citizen born in Greece, and Jack and Lillian Hillman (Sakaria and the Hillmans). *Id.* The committee determined that their property not only met all educational criteria for construction of the athletic field but, in addition, included land suitable for fill and wetlands mitigation. Pet. App. 7c. After halfhearted

attempts to negotiate a purchase price—the school board offered $40,000 for six lots whose value had been placed at over $139,000 each (Pet. App. 11c)—the board adopted a resolution approving the condemnation of Sakaria's and the Hillmans' property on February 9, 1993. Pet. App. 3b.

On February 15, 1993, the board submitted its third permit application to the United States Army Corps of Engineers (Corps). Pet. App. 3b. The application proposed onsite, in-kind wetlands mitigation that would create 1.84 acres of wetlands for one acre of wetland filled by construction of the athletic field. Pet. App. 6c. Importantly, a significant portion of the property to be used for wetlands mitigation was owned by Sakaria and the Hillmans. Pet. App. 4b. This time the permit received conditional approval from the Corps. Pet. App. 3b.

On February 19, 1993 the board filed four actions in Dare County Superior Court to condemn the six lots. Pet. App. 3b. The court consolidated the actions and conducted a bench trial on the scope of the school board's condemnation authority. Pet. App. 3b-4b. The court concluded that N.C. Gen. Stat. § 115-517 (1995), which authorizes local school boards in North Carolina to condemn private property "for . . . school facilities," conferred on the board the implied power to condemn property to satisfy the wetlands mitigation requirements imposed by the federal Clean Water Act. Pet. App. 13c-14c.

Sakaria and the Hillmans appealed, arguing that "N.C. Gen. Stat. § 115C-517 [does not] permit[] a local board of education to condemn land solely used as wetlands mitigation and a source of fill." Pet. App. 7b. Sakaria and the Hillmans

argued that North Carolina law authorized the school board to condemn property to build school facilities, but not to obtain property for wetlands mitigation conditions imposed by federal law. *Id.* The court of appeals rejected this argument. *Id.*

The court acknowledged that there were, indeed, important restrictions on the state's eminent domain power. "[T]he manner in which eminent domain may be exercised is prescribed by our General Assembly." Pet. App. 8b. The court likewise acknowledged that, under North Carolina law, it had a special responsibility to construe strictly the eminent domain powers granted by the General Assembly:

> Because the exercise of the power of eminent domain is in derogation of property rights . . . statutory grants of the power of eminent domain are "limited to the express terms or clear implication of the act or acts in which the grant of the power of eminent domain is contained."

*Id.* (quoting *Highway Comm'n v. Matthis*, 163 S.E.2d 35, 38 (1968)).

Nevertheless, the court of appeals read N.C. Gen. Stat. § 115C-517 as granting the board "broad discretion to condemn . . . whenever the board is unable to acquire or enlarge the suitable site or right-of-way by gift or purchase." Pet. App. 8b. Once the school board has determined what land is necessary for the purposes described in the statute, the statute makes that determination "conclusive." *Id.* Under this analysis, the court concluded that the school board not only had the power to condemn property for actual school construction, but also possessed the implied authority to

condemn Sakaria's and the Hillmans' property for any wetlands mitigation requirements imposed by federal law. *Id.*

Sakaria and the Hillmans filed a notice of appeal and a petition for discretionary review with the North Carolina Supreme Court. The court retained the notice of appeal but denied the petition for discretionary review. Pet. App. 2g. The school board filed a motion to dismiss the appeal for lack of a substantial constitutional question, which the court denied. Pet. App. 1h. On February 9, 1996 the supreme court, acting per curiam, affirmed the court of appeals without opinion. Pet. App. 1a.

The constitutional question presented here—whether a state court may rely on the assumed dictates of federal law to expand state regulatory authority without violating the constitutional division of powers principles—was properly raised below. Both the superior court and court of appeals addressed whether N.C. Gen. Stat. § 115C-517 (1995) authorizes the school board to condemn the landowners' property for wetlands mitigation. Pet. App. 13c-14c; Pet. App. 7b. Because it is undisputed that federal law, through the Clean Water Act, is the source of any wetlands mitigation requirement, the condemnation question "fairly appears . . . to be interwoven with the federal law." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Moreover, where (as here) state courts address a mixed question of federal and state law and fail to clearly state on the face of their opinions an adequate and independent ground of decision, this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041.

## REASONS FOR GRANTING THE PETITION

### BASIC PRINCIPLES OF FEDERALISM DEMAND REVIEW OF NORTH CAROLINA'S UNCRITICAL RELIANCE ON FEDERAL LAW TO EXPAND STATE REGULATORY AUTHORITY

Since the early days of the Republic, the dividing line between federal and state authority has mattered deeply. The reasons are clear. Among other things, this division of authority promotes political accountability and undergirds the integrity and uniformity of federal (and state) law. *New York v. United States*, 504 U.S. (1992); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Not surprisingly, the Court previously has demonstrated its willingness to review cases implicating these principles even where no circuit conflict is in play. *See, e.g., New York v. United States*, *supra*. The North Carolina courts' disregard of these principles in the proceedings below thus raises an important federal question warranting this Court's review. SUP. CT. R. 10(c).

Section 404 of the Clean Water Act authorizes the United States Army Corps of Engineers to require wetlands mitigation as a condition of receiving a permit to build on wetlands. The statute is silent, however, about a state's authority to condemn private property for wetlands mitigation. Similarly, the North Carolina statute authorizing local school boards to condemn private property for school facilities says nothing about wetlands mitigation. Accordingly, neither federal nor state law expressly authorizes the school board to condemn private property to satisfy the mitigation conditions of a Section 404 permit.

Despite the absence of express statutory authority, the North Carolina courts have held that the school board may condemn private property to satisfy the mitigation conditions of a Section 404 Clean Water Act permit. By stepping into the breach created by the silence of Congress and the North Carolina General Assembly, the courts below have violated fundamental protections accorded by the constitutional division of federal and state authority. *See, e.g.*, U.S. Const. Art. I, §§ 8, 10; *id.* amend. X. Indeed, the decision below violates at least three of the basic principles served by the Constitution's allocation of powers within our federal system.

First, it allows both federal and state officials to avoid political accountability. In the circumstances of this case, federal officials can escape political responsibility for the condemnation decision by asserting that "they" didn't condemn the land, while state officials can similarly avoid public outcry by asserting that "they" didn't require the wetlands mitigation. Neither government, in short, is ultimately accountable to the people for any repercussions of the political decision made below.

Second, by carelessly blending ingredients of federal and state law, the lower courts have undermined the integrity of that law. Congress, executive agencies, and federal courts will ultimately lose control of the content and scope of federal law if state courts are permitted to blend federal and state laws in a manner that ignores federal case law and congressional intent. Such a course could frustrate as well the efforts of state lawmakers when state court judgments appear to carry either the imprimatur or mandate of federal law.

Finally, the decision below promotes disunity in federal law. If left uncorrected, state courts will reach inconsistent interpretations of Section 404 of the Clean Water Act. Some will use a combination of Section 404 and state law to authorize condemnations for wetlands mitigation; others will not. The resulting inconsistencies could frustrate the federal government's attempts to enforce a consistent nationwide wetlands policy.

The North Carolina Court of Appeals held, and the North Carolina Supreme Court affirmed, that the Dare County school board had the authority to condemn Sakaria's and the Hillmans' property to satisfy the wetlands mitigation condition of a federal permit. Pet. App. 2a; Pet. App. 8b. Neither federal nor state law, however, expressly authorizes condemnation for wetlands mitigation. By concluding that federal wetlands policy implicitly expanded the board's eminent domain power, the lower courts carelessly coalesced federal and state law without regard for the constitutional limits on each sovereign's legitimate role in our federal system.

## I. The North Carolina Courts Erroneously Assumed That Federal Policy Enlarged The Board's Regulatory Power

The North Carolina courts addressed "whether N.C. Gen. Stat. § 115C-517 permits a local board of education to condemn land solely used as wetlands mitigation and a source of fill." Pet. App. 7b. This question initially appears to rest solely on state law. The lower courts' resolution of the question, however, ultimately *did not* turn upon state law because, on its face, § 115C-517 does not authorize

condemnation of property for wetlands mitigation, but rather merely authorizes condemnation:

> . . . to acquire or enlarge a suitable site or right-of-way for a school, school building, school bus garage or for a parking area or access road suitable for school buses or for other school facilities . . . .

N.C. GEN. STAT. § 115C-517 (1995). Therefore, if the statute (as the lower courts held) includes the authority to condemn private property for wetlands mitigation, the source of *that* power lies in federal law.

The property on which the board proposed to build its athletic field fell within the jurisdiction of the Corps of Engineers. Pet. App. 3b. Indeed, as the board's own expert testified, compliance with federal wetlands policy was the ultimate goal of the board's third permit application. "[T]he primary permit we had to achieve at that time was the Corps' approval under section 404 of the Clean Water Act." R.224. Given the importance of federal approval, therefore, the natural question for the courts below was whether the Clean Water Act authorized the board to condemn property for wetlands mitigation. *That* question, however, went unasked—presumably because the Clean Water Act does not even address, much less grant, a state's authority to condemn property.

Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1996), authorizes the Secretary of the United States Army, "acting through the Chief of Engineers," to issue "permits ... for the discharge of dredged or fill materials in the navigable waters [of the United States]." *Id.* at §§ 1344(d), (a). Such

permits are issued "subject to such conditions as [the Secretary] or his authorized representative may from time to time impose." 33 C.F.R. § 325.8(a) (1996). The Corps of Engineers, furthermore, has the statutory goal of ensuring "no overall net loss of the Nation's remaining wetlands base." 33 U.S.C. § 2317(a)(1) (1996). To achieve this goal, "[m]itigation requirements shall be conditions of standard Section 404 permits." Notice and Correction, 55 Fed. Reg. 9210, 9213 (1990) (Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army). Mitigation, in turn, takes three forms: "avoidance, minimization and compensatory mitigation." *Id.* at 9211. But, despite the foregoing details, neither the statute, its legislative history, its implementing regulations, nor the Memorandum of Agreement authorizes a state to condemn private property for compensatory wetlands mitigation. On this point federal law is simply silent.

The lower courts, in a series of unjustified leaps of logic, construed this silence as a federal expansion of state regulatory power. From state law, North Carolina courts derived the school board's authority to condemn *in general*. From federal law, the lower courts marked the *specific contours* of the *general* power: the board could use its general condemnation power to achieve the specific wetlands mitigation goals of federal policy. The lower courts, in short, declared that the Clean Water Act—even without expressly so providing—expanded the regulatory authority of the state.

This result, at first blush, hardly seems remarkable. After all, modern federal law often requires the joint action and cooperation of state and federal governments. But in such cases, the contours (and demands) of joint federal/state action

are specifically and expressly established; the dividing line between state and federal authority, however intertwined, is nevertheless spelled out. *See, e.g.*, 16 U.S.C. §§ 1451-65 (Coastal Zone Management Act of 1972); 16 U.S.C. §§ 461-69j (establishing National Trust For Historic Preservation). As a result, citizens affected by joint federal/state action know where to go to obtain political relief, the respective sovereigns are apprised of the limits of their regulatory competencies, and the express boundaries between the sovereigns aid the federal courts in maintaining the uniformity of federal law. The regime established below is devoid of any of these virtues.

## II. The Lower Courts' Conclusion That Federal Policy *Ipso Facto* Expands State Power Undermines The Basic Structure Of Our Federal System

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Among other things, "a healthy balance of power between the States and the Federal Government" *(id.* at 458) promotes political accountability, *e.g., New York v. United States*, 505 U.S. 144, 168-69 (1992), the integrity of federal and state law, *e.g., Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Oregon v. Hass*, 420 U.S. 714, 719 (1975), and the uniformity of federal law, *e.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816). *See generally* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1481-1511 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)). The decision below undermines each of these principles.

1. This Court recognized in *New York v. United States*, 505 U.S. 144 (1992), that the clear division of authority between state and federal governments promotes an exceptionally significant value in our democratic society: political accountability. In that case, the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 was held unconstitutional under the Tenth Amendment because it "compel[led] the States to enact or administer a federal regulatory program." *Id.* at 188. The Court viewed such compulsion as diminishing "the accountability of both state and federal officials." *Id.* at 168. Federal officials can shift "the brunt of public disapproval" to state officials, while state officials, in turn, can blame the federal government for compelling the state to administer an unpopular program. *Id.* at 169. The decision below similarly diminishes political accountability.

Federal law allows the Army Corps of Engineers to require wetlands mitigation as a condition of receiving a permit to build on wetland (*e.g.*, Notice and Correction, 55 Fed. Reg. 9210, 9213 (1990)), but says nothing about how such compensatory property will be obtained. Conversely, North Carolina law authorizes local school boards to condemn property (N.C. GEN. STAT. § 115C-517 (1995)), but says nothing about condemning property for wetlands mitigation. As a result, federal officials can argue that the board of education condemned the property, and the board (in turn) can argue that the federal government required the condemnation for wetlands mitigation. Thus, all of the governmental decisionmakers in this case can plausibly (and effectively) escape any adverse political consequences of the decision to condemn Sakaria's and the Hillman's property. And, with that escape, one of the most important principles guarded by our

system of federalism—public accountability for official actions—is undermined.

2. A healthy division of federal and state authority not only promotes political accountability, it also guarantees the integrity of federal and state law. Integrity, in this sense, ensures that each sovereign in the federal system determines the content of its own law.

*Michigan v. Long*, 463 U.S. 1032 (1983), underscores the importance of maintaining a clear separation between federal and state authority to protect the integrity of the nation's coordinate legal systems. There, the Court held that it had jurisdiction to review a state court decision if the judgment under review lacked "a plain statement that [it] rested on an adequate and independent state ground" because "such an approach will . . . preserve the integrity of federal law." *Id.* at 1044, 1041; *cf. Oregon v. Hass*, 420 U.S. 714, 719 (1975) (holding that state courts may not impose such greater restrictions as a matter of federal constitutional law "when this Court specifically refrains from imposing them"). The decision below directly implicates the concerns about the integrity of federal and state law that inform *Long* and *Hass*.

The Constitution places Congress, the president, and federal courts in control of federal law. U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1. Correlatively, state courts have a duty to interpret federal law according to congressional intent, the guidance of executive agencies, and federal court decisions. If state courts were free to fuse state and federal law without regard for congressional intent, administrative guidance, or federal case law, federal officials would effectively lose control over the content and scope of federal law. This prospect,

moreover, is not merely of hypothetical concern. Since none of the above-mentioned sources of federal interpretation offers any support for what the lower courts in this case simply assumed—that the Clean Water Act establishes purposes for which states may condemn private property—the decision below effectively undermines the integrity of federal law.

The decision below likewise affects the integrity of state law. After *Hass* and *Long*, "[i]f [state courts] wish to reach a result not compelled by federal law, they must make clear that state law provides the basis for their decision." William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 290 (1990). Otherwise, a state court could "immunize its decision against overruling through state political processes." Ginsburg, Book Review, 92 HARV. L. REV. 340, 343 (1978) (reviewing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1st ed. 1978)). By relying on federal law to expand state regulatory authority, however, the courts below have created an ambiguous ground of decision that may frustrate correction by state lawmaking processes. Faced with the decision below, which is apparently grounded on federal law, the North Carolina General Assembly could reasonably conclude—even if it desired otherwise—that it could not withhold the authority to condemn property for wetlands mitigation from school boards.

3. The proper division of authority between federal and state governments also promotes the uniformity of federal law. This Court's jurisdiction over state court decisions exists, in important part, to further this end. As Justice Story pointed out long ago:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.

*Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) (Story, J.).

The courts below held that North Carolina law authorizes a local school board to condemn property to satisfy the mitigation requirements of a federal Clean Water Act permit. Pet. App. 8b. This holding undermines the uniformity of federal law by opening up the possibility of inconsistent decisions from state to state on the same point of law. This is the possibility that Justice Story identified as a principal *raison d'être* for this Court's appellate jurisdiction over state court decisions involving federal law. The salient consequence of failing to review this decision is plain: forming a consistent nationwide wetlands policy could well be frustrated by a diversity of state court decisions regarding the ability of state agencies to invoke the Clean Water Act as grounds for a condemnation action.

* * *

The division of authority between state and federal governments involves far more than fussy formalism. *New York v. United States*, 505 U.S. 144, 187-88 (1992). On the contrary, that division goes to the essence of our constitutional structure, which divides power to preserve freedom.

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty.

*Gregory v. Ashcroft*, 501 U.S. 452, 458, 459 (1991).

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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August 1, 1996

## APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
ELPIS SAKARIA
Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
RAJ ALEXANDER TRUST, Elpis J.G.B.
Sakaria, Trustee,
Defendant.

DARE COUNTY BOARD OF EDUCATION
a body politic an corporate,
Plaintiff,
v.
JERA ASSOCIATES, a Maryland
Partnership,
Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
JACK HILLMAN and wife, LILLIAN HILLMAN,
Defendants.

Appeal by defendants as of right pursuant to N.C.G.S 7A-30(1) of a decision by the Court of Appeals which affirmed judgments for the plaintiff by the Superior Court, Dare County, 118 N.C. App. 609, 456 S.E. 2d 842 (1995), and which involves substantial questions arising under the Constitution of the United States and the Constitution of this State. Heard in the Supreme Court 12 December 1995.

*W. Brian Howell and Deveau & Norcross, P.A., by Ronald E. DeVeau, for plaintiff-appellee.*

*Vandeventer, Black, Meredith & Martin, by Robert L O'Donnell, for defendants-appellants.*

PER CURIAM.

AFFIRMED.

## APPENDIX B

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate, Plaintiff,
v.
Elpis SAKARIA, Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate, Plaintiff,
v.
RAJ ALEXANDER TRUST, Elpis J.G.B.
Sakaria, Trustee, Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate, Plaintiff,
v.
JERA ASSOCIATES, a Maryland Partnership,
Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate, Plaintiff,
v.
Jack HILLMAN and wife, Lillian Hillman.
No. COA94-739.

Court of Appeals of North Carolina.
May 2, 1995.

Appeal by defendants from judgment entered 27 April 1994 and corrected judgment entered 25 May 1994 in Dare County Superior Court by Judge Jerry R. Tillett. Heard in the Court of Appeals 23 March 1995.

Kellogg, White, Evans and Gray by Ronald E. DeVeau, Manteo, for plaintiff-appellee.

Vandeventer, Black, Meredith & Martin by Norman W. Shearin, Jr., Robert L. O'Donnell, and R. Gregory McNeer, Jr., Kitty Hawk, for defendant-appellants.

GREENE, Judge.

Elpis Sakaria, Raj Alexander Trust, Elpis J.G.B. Sakaria, Trustee, Jera Associates, and Jack and Lillian Hillman appeal from a 27 April 1994 final judgment and 25 May 1994 corrected judgment entered in Dare County Superior Court, decreeing that the Dare County Board of Education (plaintiff) has the authority to condemn lands for construction and use of proposed school facilities. All the defendants gave notice of appeal; however, because the assignments of error and arguments in defendants' brief only relate to property belonging to defendants Sakaria and the Hillmans, we need only address those arguments. N.C.R.App.P. 10(c)(1); N.C.R.App.P 28(b).

Plaintiff is responsible for the operation of the Cape Hatteras School (the School) in Buxton, North Carolina, which is located on the Pamlico Sound side of Hatteras Island, part of the Outer Banks. Beginning in 1985 and again in 1988, plaintiff recognized that the School needed additional athletic facilities in order to meet state and southern accreditation requirements and began efforts to expand the School's athletic facilities in 1985. Plaintiff owns a 12.5 acre tract of land which is located west of the School's campus, which includes all land from the highway to the Pamlico

Sound east of defendants' lots. Therefore, defendants' lots are surrounded by plaintiff's property on three sides, and the Pamlico Sound on the fourth side. Because portions of plaintiff's land and defendant's lands are wetlands, they are within the jurisdictional bounds of the United States Army Corps of Engineers (the Corps) under Section 404 of the Clean Water Act, 33 U.S.C. Section 1344 and Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. Section 403 and of the North Carolina Department of Environment, Health and Natural Resources, Division of Coastal Management (Coastal Management) and subject to numerous state and federal regulations.

Plaintiff planned to use its 12.5 acre lot, which contains 3.1 acres of wetlands, to expand the School's athletic facilities. In June 1988, Coastal Management denied plaintiff's requests for a dredge and fill permit and water quality certification to make the 12.5 acre tract suitable for building athletic fields because plaintiff's proposal would result in an unacceptable loss of wetlands. A second permit application by plaintiff in 1992 was denied by both Coastal Management and the Division of Environmental Management after the coastal wetlands were realigned. On 9 February 1993, plaintiff adopted a resolution approving condemnation of defendant's six lots, lot 5 belonging to the Hillmans and lot 6 belonging to Sakaria, and submitted a proposal involving defendants' lots to the Corps on 15 February 1993. Under this proposal, defendants' lots 5 and 6 would be used only as a source of fill and for wetlands mitigation. This proposal received a conditional permit from the Corps. On 19 February 1993, plaintiff filed four separate actions in Dare County Superior Court to condemn the six lots. The four actions were consolidated, and the court conducted a bench trial on

the issue of plaintiff's authority to condemn defendants' property.

At trial, Allen Burrus (Mr. Burrus), a member of plaintiff, testified that after Coastal Management denied a permit to use plaintiff's 12.5 acres for additional facilities, plaintiff "formed an ad hoc committee" which looked for available and suitable properties that were within "five miles of the facility," consisted of "eight or ten acres" and "had to be accessible by road, hard road." Mr. Burrus testified that the properties considered by the ad hoc committee were unavailable because they either did not meet the criteria necessary for school facilities, were deemed an Area of Environmental Concern, consisted of federal property belonging to the National Park Service, or were rejected by the various federal and state agencies having jurisdiction over the wetlands.

Mr. Burrus testified that in order to get a permit from the Corps, plaintiff had to mitigate damages to wetlands, and defendants' property was being offered to satisfy that mitigation "(n)ot completely but at least partly." Plaintiff's proposal, which included using defendants' lots, received a conditional permit from the Corps. Under plaintiff's proposal, of the 1.8 acres necessary to satisfy the requirement of wetlands mitigation, "approximately a half an acre" of lots 5 and 6 would be used, with property owned by plaintiff supplying the remaining 1.3 acres necessary for mitigation. Mr. Burrus stated that plaintiff's ad hoc committee had "looked for complete sites" and, therefore, had not searched "for alternatives to find a half acre that can be offered for mitigation." Mr. Burrus agreed that there are numerous parcels within Dare County that would contain a half acre of

property that could be used to satisfy the mitigation requirement, but because the agencies presented to plaintiff "in verbal exchanges more than once" that on-site mitigation would increase its chances of obtaining a permit, plaintiff looked for "on-site, on-kind mitigation." Mr. Burrus agreed, however, that the Corps permitted off-site mitigation. When asked whether plaintiff considered establishing the half acre of wetlands on property plaintiff already owned, Mr. Burrus replied, "Yes, sir, there was... They just-they never gave us a yes on that. They gave us a yes on this particular scenario (involving defendants' properties) and that's it. And we offered them quite a few scenarios."

George Wood (Mr. Wood), an environmental consultant, testified that he was on the ad hoc committee that looked at forty-one possible sites for the proposed athletic fields. In the second application, plaintiff requested authorization to use a site south of Canadian Hole for off-site mitigation, but the request was denied by Coastal Management. Mr. Wood stated he did not know all the reasons for the denial, "but one of the considerations was that there was concern about off-site mitigation, that the preference of the state agencies was for mitigation which was closer to the development site." On-site means "near the site" where the impacts are. He explained that although off-site mitigation is permitted under the federal regulations, "it is not the highest preference" because the Corps prefers "to have at least the mitigation done in the same system as the unavoidable impacts are done... (I)f there is the opportunity for a higher level of practicable mitigation, higher level in their priority of consideration, that you should use the highest level of mitigation practicable." Mr. Wood testified that the forty-one sites considered by the ad hoc committee were first

viewed for use as the facilities, and "they were subsequently reviewed again for sites for mitigation, so we visited each site twice." None of the sites, however, were appropriate for various reasons, including distance, expense, unsuitability, or unavailability. Mr. Wood also stated that in considering defendants' lots:

> We were trying to meet all the regulatory requirements, site-development requirements and we were trying as best we could to duplicate uses for as much of the property as possible so we could meet the minimization, so that we could meet the requirements of the mitigation not only by the Corps of Engineers but by the state agencies and so that we could meet the requirements of environmental management and other regulatory agencies that were all tugging on this application in different ways. So we felt that the proposed plan-in fact, we were encouraged by the agencies that the proposed plan had merit and that we should advance it and we did and we received approval... (T)he school board advanced the application, but it was advanced at the advice and the consultation with the state and federal agencies, so it was-it was a negotiated application certainly.

He testified that plaintiff advanced its proposal involving defendants' lots to meed the Corps' requirements "to minimize wetland impacts and then to adequately mitigate under their sequence of preference" and to comply with applicable regulations. Mr. Wood also testified that he did not think Coastal Management "rejected the consideration of off-site mitigation. We certainly pursued it, continued to pursue it."

After making findings of fact, the trial court, in its order filed 27 April 1994, concluded plaintiff "has the authority to take the lands of" defendants by condemnation. The court also concluded the lands described in the complaints are necessary for the construction of the school facilities proposed by plaintiff and the uses of portions of the property for wetlands mitigation and a source of fill are necessary for

the construction of the school facilities proposed and clearly implied in the condemnation authority of plaintiff. The trial court therefore ordered that plaintiff has the authority to condemn defendants' lots, vested title to defendants' properties in plaintiff, and ordered the Dare County Clerk of Superior Court to disperse the deposits made by plaintiff pursuant to N.C.Gen.Stat. Section 40A-41 to each of the defendants "as a credit upon the amount of compensation to be determined and provided by law." The court then entered a corrected judgment "to include the specific descriptions of the lands affected and of the property acquired by" plaintiff.

The issues presented are (I) whether N.C.Gen.Stat. Section 115C-517 permits a local board of education to condemn land solely used as wetlands mitigation and a source of fill; and (II) if so, whether plaintiff's action of condemning lots 5 and 6 as necessary to build athletic facilities was an arbitrary abuse of discretion.

I.

Defendants first argue that taking lots 5 and 6 only "for mitigation and as a source of fill is neither authorized by the limited grant of authority contained in N.C.G.S. Section 115C-517 nor clearly implied by the grant" because such uses are not "to construct any 'school facility.'" We reject this argument.

Eminent domain is the "power of the State or some agency authorized by it to take or damage private property for a public purpose upon payment of just compensation," and the manner in which eminent domain may be exercised is prescribed by our General Assembly. *Highway Comm'n v.*

*Matthis*, 2 N.C.App.233, 238, 163 S.E.2d 35, 38 (1968). Because the exercise of the power of eminent domain is in derogation of property rights, all laws conferring this power must be strictly construed; therefore, statutory grants of the power of eminent domain are "limited to the express terms or clear implication of the act or acts in which the grant of the power of eminent domain is contained." *Id.*

Local boards of education possess the power of eminent domain and have broad discretion to condemn under Chapter 40A of the General Statutes a "suitable site or right-of-way" for "a school, school building, school bus garage or for a parking area or access road suitable for school buses or for other school facilities" whenever the board is unable to acquire or enlarge the suitable site or right-of-way by gift or purchase. N.C.G.S. Section 115C-517 (1994). "(T)he determination of the local board of education of the land necessary for such purposes shall be conclusive" provided that no more than a total of fifty acres for one site is condemned. *Id.* Plaintiff, therefore, has the discretion under Section 115C-517 to determine what land constitutes a "suitable site" to construct its athletic facilities and what land is "necessary" to construct its athletic facilities, which may, depending on the circumstances of a particular case, encompass more than the actual land on which the athletic facility sits. Plaintiff, therefore, had the discretion under Section 115C-517 to determine that lots 5 and 6 are "necessary" to construct its proposed athletic facilities.

II.

Under Section 115C-517, the courts are bound by the discretionary decision of a local board of education in

selecting and determining the land necessary to construct a school, school building, school bus garage, a parking area, an access road suitable for school buses or "other school facilities" unless that decision is an "arbitrary abuse of discretion or disregard of law." *Board of Educ. v. Allen*, 243 N.C. 520, 523, 91 S.E.2d 180, 183 (1956) (discussing predecessor to 115-517); *see also Department of Transp. v. Overton*, 111 N.C.App. 857, 859, 433 S.E.2d 471, 473 (1993); *Guyton v. Board of Transp.*, 30 N.C.App. 87, 90, 226 S.E.2d 175, 177 (1976). A discretionary act is an arbitrary abuse of discretion when it is "not done according to reason or judgment, but depending upon the will alone" and "done without reason." *In re Housing Auth.*, 235 N.C 463, 468, 70 S.E.2d 500, 503 (1952); *Wyatt v. Hollifield*, 114 N.C.App. 352, 358, 442 S.E.2d 149, 153 (1994) (abuse of discretion means action so arbitrary it could not have been result of a reasoned decision).

Defendant argues that plaintiff's decision to use lots 5 and 6 only for wetlands mitigation and as a source of fill is arbitrary and capricious because "there were alternate sources available to meet (plaintiff)'s mitigation needs," and plaintiff did not explore available off-site mitigation alternatives. We disagree.

The evidence in this record shows that because the area on Hatteras Island on which plaintiff is proposing to build an athletic facility is an ecologically sensitive area containing a significant portion of wetlands which are under the jurisdiction of the Corps and Coastal Management and subject to other federal and state agencies, plaintiff cannot construct its proposed athletic facility without having additional land for wetlands mitigation and as a source for fill. For mitigation

purposes, plaintiff has to create wetlands to replace the acre of wetlands which was to be filled under its proposal. The evidence also shows that after plaintiff's proposal in its first permit application was rejected, plaintiff formed a committee and considered forty-one sites as "complete sites" and for mitigation purposes, all of which were rejected because of cost, distance, or other reasons. In its second permit application, which was denied, plaintiff proposed areas of off-site mitigation which were also rejected by Coastal Management. Although plaintiff was aware that off-site mitigation was permitted and there were other sources of fill on Cape Hatteras, the Corps and Coastal Management gave off-site mitigation a lower preference than on-site mitigation, rejected all of the off-site mitigations proffered by plaintiff, and encouraged the proposal involving lots 5 and 6, which would provide on-site mitigation. Although there is evidence that alternate sites were available which plaintiff did not consider, we cannot say on this record that plaintiff's decision to condemn lots 5 and 6 was "not done according to reason or judgment, but depending upon the will alone" and "done without reason." Therefore, plaintiff's decision that lots 5 and 6 are necessary for construction of its athletic facilities was not an arbitrary abuse of discretion.

Defendants also argue in their brief that the trial court "clearly erred in finding that (plaintiff) made a good faith effort to acquire all six lots by purchase as required by N.C.G.S. Section 115C-517." Because, however, defendants did not assign this finding as error, we need not address this

argument. N.C.R.App.P. 10(c)(1). For these reasons, the decision of the trial court is

Affirmed.

LEWIS and MARK D. MARTIN, JJ.,
concur.

## APPENDIX C

North Carolina — General Court of Justice
Dare County — Superior Court Division

DARE COUNTY BOARD OF EDUCATION,
a body of politic and corporate
Plaintiff — 93-CVS-127

v.

ELPIS SAKARIA
Defendant

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate
Plaintiff — 93-CVS-128

v.

RAJ ALEXANDER TRUST, Elpis J.G.B. Sakaria, Trustee
Defendant

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate
Plaintiff — 93-CVS-129

v.

JERA ASSOCIATES, a Maryland Partnership
Defendant

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate
Plaintiff 93-CVS-130

v.

JACK HILLMAN and wife, LILLIAN HILLMAN
Defendants

CORRECTED JUDGMENT

THIS CAUSE coming on to be heard and being heard before His Honor, Jerry R. Tillett, Judge Presiding, at the January 25, 1994 session of the Dare County Superior Court, upon the Complaint, Declaration of Taking and Notice of Deposit of the Plaintiff in each of the above captioned actions, and the Answers and Amended Answers of the Defendants, the cases being consolidated for hearing by Order of January 25, 1994, and it appearing to the Court that all parties have been duly served and are properly before the Court, and the Court finding that the Plaintiff in each of the above captioned actions is a local public condemnor, determines that all of the issues raised by the pleadings, other than the issue of compensation, may be heard and determined either in or out of session pursuant to G.S.40A-47; and upon hearing of the witnesses and evidence of the Defendants, the Court makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. The Plaintiff, the Dare County Board of Education, is a body corporate under G.S.115C-40 and is a local public condemnor pursuant to G.S.40A-3(b).

2. That the lands affected by the condemnation action and the lands subject to the taking, are described in attachments to the Complaints in each of the actions.

3. The Plaintiff is a local Board of Education authorized to acquire lands by eminent domain for school facilities.

4. That the purpose for which the lands of the Defendants are sought to be condemned is for the expansion of the Physical Education facilities, athletic facilities, school playground, educational uses and the expansion of the Cape Hatteras School campus.

5. The Cape Hatteras School is a K-12 school located in Buxton, Dare County, North Carolina, the site for which is only eighteen (18) acres. A survey by the North Carolina Department of Public Instruction in 1977 and 1985 stated that thirty-five (35) acres are needed for a K-12 school and athletic field, and that the site is only forty-eight percent adequate in size for a K-12 school.

6. The Cape Hatteras School is accredited by the State of North Carolina under a waiver but not accredited by the Southern Association of Secondary Schools and Colleges. A

significant reason for this is the fact that the area of the campus is only eighteen acres rather than thirty-five acres.

7. In 1985 and again in 1988, the Dare County Board of Education recognized that existing athletic facilities were inadequate in space, there not being enough fields nor enough property.

8. Without obtaining additional high ground, with approximately ninety percent of the present eighteen acre site being high land, there is not sufficient buildable high land owned by the Board of Education to build the athletic facilities to minimum standards.

9. In 1985, the Board of Education began an investigation of the feasibility of expanding recreational facilities at the school by focusing on a 12.5 acre tract located to the west of the existing campus which it had acquired in the late 1970s.

10. Approximately 3.1 to 3.2 acres of the 12.5 acre tract are high lands and the remainder are wetlands.

11. In June of 1988, the Division of Coastal Management denied the Board of Education's application for a permit to use the 12.5 acre tract for expansion of school recreational facilities based on the resulting loss of wetlands and coastal marsh.

12. After this denial, the Board of Education formed and ad hoc committee of eight local Hatteras Island residents to locate properties for the expansion.

13. The criteria for these properties specify an eight to ten acre minimum size, located within five miles of the present Cape Hatteras School, and accessible by road.

14. Forty-one properties were reviewed both for meeting the criteria established for the construction of the facilities and for wetlands mitigation. A few sites which met the criteria were located in an area of environmental concern and could not be developed. There were no other properties which met the criteria.

15. Between August 1988 and March 1992, the Board of Education reduced and reconfigured the plans for the project in order to minimize the impact to wetland areas. During the review process of this second permit application for a Water Quality Certification and a dredge and fill permit, the Division of Coastal Management determined that physical changes had occurred to require a new coastal wetlands alignment which resulted in the revised plans again impacting coastal wetlands.

16. The second permit application for the project was denied by the Division of Environmental Management (DEM) on July 14, 1992 and the Division of Coastal Management (DCM) on August 4, 1992.

17. The location of the proposed facilities described in the second application would not have impacted or involved any of the Defendants' properties, nor their access easement and would not have necessitated the acquisition of these properties by the Board of Education.

18. Off site mitigation of wetlands impact was also pursued at numerous locations which were found to not be suitable by reason of objections or refusals by various governmental agencies, shoreline erosion, distance, or cost.

19. The Dare County Board of Education sought for a third time, a permit to fill wetlands and reduced the proposed facilities to the bare minimum that would allow the school to meet the criteria of the Division of School Planning and North Carolina Athletic Association Rules and Regulations and for accreditation. These reduced facilities were proposed to be built on the existing school campus and on adjoining lands owned by the Defendants.

20. This third application proposed on site, in kind mitigation, to create 1.84 acres of wetlands to replace approximately 1 acre of wetlands to be filled in connection with the project.

21. The proposed athletic and playground facilities in this third application included a baseball field; a football/soccer/softball combination field; in addition to bleachers, storm water drainage and septic tank repair areas.

22. The baseball field an part of the bleachers, football field and vegetative filter for storm water drainage are proposed to be located on lands over which the Defendants now have their access easement and on four of the Defendants' six lots.

23. The proposed baseball field would be located over substantially all of that part of Defendants' access easement which runs northwardly from N.C. Highway 12.

24. The proposed vegetative filter required for storm water management would be located over another portion of the access easement and over parts of Lots 1 and 2 owned by the Defendants.

25. All six lots of the Defendants, including all of the east-west access easement, together with existing lands owned by the Dare County Board of Education on the same site, will be used to supply fill material to those areas of wetland being filled for which mitigation is required.

26. In order to meet the requirement of converting highlands into wetlands to mitigate for filling other wetlands, portions of all six lots and the access easement of the Defendants together with lands of the Dare County Board of Education located on the west and adjacent to N.C.Highway 12 are to be used for wetlands mitigation.

27. There is a required setback of fifty (50) feet from the septic tank repair area to the edge of any wetlands or wetlands created for mitigation purposes.

28. The U.S. Army Corps of Engineers "404" line of denoting Corps of Engineers jurisdiction and the North Carolina Coastal Area Management Act jurisdictional wetlands line, crosses the southern portion of all six of the Defendants' lots resulting in those lots being substantially within the jurisdictional boundaries of the U.S. Army Corps of Engineers and the North Carolina Coastal Area Management Act.

29. Non-water dependent uses cannot be constructed within

the CAMA (Coastal Area Management Act) jurisdictional wetlands. Water dependent uses would include linear structures such as piers for access to the sound waters. A residence or house could not be built in CAMA wetlands, even on pylons, in February of 1993 when these actions were filed.

30. The acquisition of the Defendants' lands will add additional contiguous acreage to the existing eighteen acre school campus toward the thirty-five acres which are needed for the K-12 school.

31. Portions of the proposed facilities would occupy parts of and directly impact and affect all of the lands, lots and easement of the Defendants.

32. Other educational uses planned by the Board of Education would involve the lands now owned by the Defendants to teach environmental sciences, research and study of wetlands, and educational programs regarding mitigation, preservation, enhancement and understanding of maritime forests and wetlands.

33. The proposed school athletic facilities are designed using approved standards and specifications of the North Carolina Recreational Standards for High School and Middle School Play and State Facilities Planning Standards.

34. Because portions of the existing lands of the Board of Education where the Cape Hatteras School is located, and the lands of the Defendants proposed for acquisition for the development of school facilities, are wetlands and lie within the

jurisdictional bounds of the North Carolina Department of Environment, Health and Natural Resources and the U.S. Army Corps of Engineers, some fifteen state and federal agencies had to be dealt with and reviewed the permit application for the facilities proposal.

35. Around 25,000 square feet of vegetative filter of at least 50 feet in width is required by the Division of Environmental Management for storm water management related to the Cape Hatteras School site, including the proposed new facilities.

36. The siting of the new proposed facilities was driven in part by the relocation of the CAMA jurisdictional wetlands, to meet regulatory requirements and to duplicate uses of the property in order to minimize wetlands impacts.

37. The present lands of the Dare County Board of Education, and in addition thereto, the lands of the Defendants which the Board of Education has determined are necessary for the proposed facilities, are permittable for the construction of the facilities proposed in the third permit application.

38. The third permit application for the Cape Hatteras School campus facilities was approved by the appropriate state and federal agencies pursuant to their jurisdictional authority.

39. In order to construct the Cape Hatteras School facilities, all of the conditions in the approved permits would have to be met. The Dare County Board of Education cannot construct its proposed facilities unless it meets all the conditions of the issued permits. With the issuance of the permits now held by the

Plaintiff, the lands of the Defendants sought to be condemned are suitable for the school facilities proposed by the Plaintiff.

40. These permit conditions include:

a. The prevention of increase in turbidity outside the construction area; and

b. The mitigation plan proposed is followed with certain modifications; and

c. Notification of DEM Wetlands Group in advance of site grading; and

d. An erosion and sedimentation plan being filed; and

e. Mitigation being coordinated with the Division of Coastal Management and the NC Wildlife Resources Commission; and

f. Inspections by state agencies and the Corps of Engineers; and

g. The mitigation area being monitored by qualified personnel; and

h. An archeological site survey and testing being conducted; and

i. Construction must be completed by December 31, 1996; and

j. Notification of the U.S. Army Corps of Engineers before commencement and completion of construction.

41. The property of the Defendants, being the subject of this action, is surrounded by existing properties of the Dare County Board of Education on three sides.

42. Negotiations by the Plaintiff with the Defendants to purchase their property began in 1988. Reports of the

negotiations with the Defendants were made to the Board of Education by its attorney on a regular basis.

43. After obtaining appraisals of the Defendants' properties, the attorney for the Board of Education was authorized to offer $44,000.00 for the Defendants' properties and to go up to $60,000.00 before getting further Board approval.

44. One of the Defendants, Mr. Hillman, negotiated for all of the Defendants and met with the Board of Education attorney asking $139,000.00 for each lot of the Defendants.

45. Between February 9, 1993 and February 19, 1993, before filing these condemnation actions, an offer to purchase all of the Defendants' lands for $44,400.00 was made to Mr. Hillman. This offer was not accepted. The Defendants last demand was for $139,000.00 for each of the six lots.

46. The Plaintiff has sought in good faith to purchase the lands of the Defendants and the lands sought to be condemned, but has been unable to acquire said lands by gift or purchase.

47. In a regular session of the Dare County Board of Education on Tuesday, February 9, 1993, the Board adopted a resolution finding that the Board of Education had been unable to acquire the needed property through negotiations for the purchase thereof during the preceding three years, and authorized the acquisition, by condemnation, of the Defendants' property.

48. On February 19, 1993, the Dare County Board of Education initiated these four actions pursuant to Chapters

115C and 40A of the North Carolina General Statutes to acquire by condemnation real property owned by the Defendants.

49. Each of the Defendants filed answer to the condemnation proceeding following an Order granting an Extension of Time, which answers challenged the authority of the Board of Education to condemn each of the Defendants' properties.

50. The Plaintiff deposited a total of $20,400.00 with the Clerk of Superior Court of Dare County estimating the sum of $3,400.00 to be just compensation for each parcel owned by the Defendants.

51. There has been no disbursement of the deposits by the Clerk of Superior Court to any of the Defendants and pursuant to G.S. 40A-42, the title to the Defendants' lots has not vested in the Dare County Board of Education.

Based upon the foregoing facts, the Court makes the following Conclusions of Law:

1. That the Plaintiff has the authority to take the lands of the Defendants, described in each of the Complaints, by Condemnation; and

2. That the lands described in the Complaints are necessary for the construction of the school facilities proposed by the Plaintiff and the uses of portions of the property for a vegetative buffer, wetlands mitigation, a source of fill, and for septic tank repair areas that are required and necessary for the construction of the

school facilities proposed, are clearly implied in the condemnation authority of the Dare County Board of Education; and

3. That title to the properties described in the Complaints should vest in the Dare County Board of Education, and the Board of Education should be entitled to possession and ownership thereof; and

4. That the Clerk of Superior Court of Dare County should disperse the deposit made in each of the actions by the Plaintiff pursuant to G.S. 40A-41 to each of the Defendants as a credit upon the amount of compensation to be determined as provided by law; and

5. That this matter should be retained on the docket for trial as to the issue of just compensation.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that:

1. The Plaintiff has the authority to take the lands of the Defendants, described in each of the Complaints, by condemnation; and

2. The lands described in the Complaints are necessary for the construction of the school facilities proposed by the Plaintiff and the sues of portions of the property for a vegetative buffer, wetlands mitigation, a source of fill, and for septic tank repair areas that are required and necessary for the construction of the

school facilities proposed, are clearly implied in the condemnation authority of the Dare County Board of Education; and

3. Title to the properties described in the Complaints is vested in the Dare County Board of Education, and the Board of Education is entitled to possession and ownership thereof. The description of the land affected, and the property acquired by the Dare County Board of Education, is described as follows:

PARCEL 1

BEGINNING at an iron pipe located and being in the East boundary of the lands of the Dare County Board of Education, formerly the F.F. Dailey tract, as more particularly described in a certain Deed recorded in Book 282, Page 223, Dare County registry; the said beginning point being located on the following courses and distances from North Carolina Grid Station "School", having coordinates of N 568,950.40, E 3028 552.94; North 58 deg. 39 min. 54 sec. West 79.14 feet, thence North 11 deg. 42 min. 07 sec. West 549.28 feet to the point of beginning; thence from the point of beginning North 78 deg. 17 min. 53 sec. East 75.00 feet to an iron pipe; thence cornering North 11 deg. 42 min. 07 sec. West 20 feet, more or less, to the mean high water mark of Pamlico Sound in a general Westerly direction to a concrete monument located and being at the intersection of the East boundary of the lands of the Dare County Board of Education with the shoreline of Pamlico Sound, the said point being located on a course of North 11 deg. 42 min. 07 sec. West 315.48 feet from the point of beginning; thence cornering South 11 deg. 42 min. 07 sec East 315.48 feet to the point and place of beginning.

PARCEL 2

BEGINNING at an iron pipe located and being on the following courses and distances from North Carolina Grid Station "School", having coordinates of N568,950.40, E 3028 552.94; North 58 deg. 39 min. 54 sec. West 79.14 feet to a concrete monument; thence North 11 deg. 42 min. 07 sec. West 549.28 feet; thence North 78 deg. 17 min. 53 sec. East 225 feet to the point of beginning; thence from the point of beginning North 78 deg. 17 min. 53 sec. East 75 feet to an iron pipe or other marker; thence cornering North 11 deg. 42 min. 07 sec. West 290.82 feet to an iron pipe; thence continuing North 11 deg.42 min. 07 sec. West 40 feet, more or less, to the mean high water mark of Pamlico Sound; thence cornering and along the mean high water mark of Pamlico Sound in a general Westerly direction to a point, which said point lies on the course of North 11 deg. 42 min. 07 sec. West 322.65 feet, more or less, from the point of beginning; thence cornering South 11 deg. 42 min. 07 sec. East 322.65 feet, more or less, to the point and place of beginning.

PARCEL 3

BEGINNING at an iron pipe located and being on the following courses and distances from North Carolina Grid Station "School", having coordinates of N568,950.40, E 3028 552.94; North 58 deg. 39 min. 54 sec. West 79.14 feet to a concrete monument; thence North 11 deg. 42 min. 07 sec. West 549.28 feet; thence North 78 deg. 17 min 53 sec. East 240 feet to an iron pipe, the beginning point; thence from the beginning point North 78 deg. 17 min. 53 sec. East 236.87 feet to an iron pipe located and being in the Southeast corner of the lands of Elpis Sakaria; thence cornering South 11 deg. 42 min. 07 sec. East

49.24 feet along the West boundary of the lands of the Dare County Board of Education to a point; thence cornering and along the North boundary of the lands of the Dare County Board of Education South 78 deg. 17 min. 53 sec. West 236.87 feet to a point; thence cornering North 11 deg. 42 min. 07 sec. West 49.24 feet to the point and place of beginning. This parcel being subject to easements of access, egress and ingress to the lands of Jera Associates, Jack A. Hillman, Elpis Sakaria and Raj Alexander Trust to and from said lands and North Carolina Highway Number 12.

PARCEL 4

BEGINNING at an iron pipe located and being on the following courses and distances from North Carolina Grid Station "School", having coordinates of N 568,950.40, E. 3028 552.94: North 58 deg. 39 min. 54 sec. West 79.14 feet to a concrete monument; thence North 11 deg. 42 min. 07 sec. West 549.28 feet; thence North 78 deg. 17 min. 53 sec. East 75.00 feet to the point and place of beginning; thence from the beginning point North 78 deg. 17 min. 53 sec. East 75.00 feet to an iron pipe or other marker; thence cornering North 11 deg. 42 min. 07 sec. West 292.36 feet to an iron pipe; thence continuing North 11 deg. 42 min. 07 sec. West 25 feet, more or less, to the mean high water mark of Pamlico Sound; thence along the mean high water mark of Pamlico Sound in a general Westerly direction following the meanderings thereof to a point, which said point lies on a course of north 11 deg. 42 min. 07 sec. West 317.48 feet, more or less, from the point of beginning; thence cornering South 11 deg. 42 min. 07 sec. West 317.48 feet, more or less, to the point and place of beginning.

PARCEL 5

BEGINNING at an iron pipe located and being on the following courses and distances from North Carolina Grid Station "School", having coordinates of N568,950.40, E. 3028 552.94: North 58 deg. 39 min. 54 sec. West 79.14 feet to a concrete monument; thence North 11 deg. 42 min. 07 sec. West 549.28 feet; thence North 78 deg. 17 min. 53 sec. East 375 feet to the point and place of beginning; thence North 78 deg. 17 min. 53 sec. East 101.87 feet to an iron pipe located and being in the West boundary of the Dare County Board of Education; thence cornering North 11 deg. 42 min. 07 sec. West 648 feet, more or less, along the Dare County Board of Education West boundary through a concrete monument to the mean high water mark of Pamlico Sound; thence cornering and along the mean high water mark of Pamlico Sound following the meanderings thereof in a general Southwesterly direction to a point, which said point lies on a course of North 11 deg. 42 min. 07 sec. West 390 feet, more or less, form the beginning point; thence cornering South 11 deg. 42 min. 07 sec. East 390 feet, more or less, to the point and place of beginning.

PARCEL 6

BEGINNING at an iron pipe located and being on the following courses and distances from North Carolina Grid Station "School", having coordinates of N568,950.40, E. 3028 552.94; North 58 deg. 39 min. 54 sec. West 79.14 feet to a concrete monument; thence North 11 deg. 42 min. 07 sec. West 549.28 feet; thence North 78 deg. 17 min. 53 sec. East 300 feet to the point and place of beginning; thence from the beginning point North 78 deg. 17 min. 53 sec. East 75.00 feet to an iron pipe or other marker; thence cornering North 11 deg. 42 min. 07 sec.

West 390 feet, more or less, to the mean high water mark of Pamlico Sound; thence cornering and along the mean high water mark of Pamlico Sound following the meanderings thereof in a general Southwesterly direction to a point, which said point lies on a course of North 11 deg. 42 min. 07 sec. West 330.82 feet, more or less, from the point and place of beginning; thence cornering South 11 deg. 42 min. 07 sec. East 330.82 feet, more or less, to the point and place of beginning.

PARCEL 7

BEGINNING at an iron pipe located and being on the following courses and distances from North Carolina Grid Station "School", having coordinates of N568,950.40, E. 3028 552.94: North 58 deg. 39 min. 54 sec. West 79.14 feet to a concrete monument; thence North 11 deg. 42 min. 07 sec. West 549.28 feet; thence North 78 deg. 17 min. 53 sec. Ease 150 feet to the point and place of beginning; thence from the beginning point North 78 deg. 17 min. 53 sec. East 75.00 feet to an iron pipe; thence cornering North 11 deg. 42 min. 07 sec. West 302.65 feet to an iron pipe; thence continuing North 11 deg. 42 min. 07 sec. West 20 feet, more or less, to the mean high water mark of Pamlico Sound; thence cornering and along the mean high water mark of Pamlico Sound following the meanderings thereof in a general Westerly direction to a point, which said point lies on a course of North 11 deg. 42 min. 07 sec. West 317.36 feet, more or less, from the point and place of beginning; thence cornering South 11 deg. 42 min. 07 sec. East 317.36 feet, more or less, to the point and place of beginning.

PARCEL 8

All that certain easement appurtenant to parcels above-described and bounded as follows:

BEGINNING at a concrete monument located and being on the North margin of the right-of-way of a North Carolina Highway Number 12, said highway having a right-of-way width of 60 feet at the point of beginning at the intersection thereof with the East boundary of the lands of the Dare County Board of Education, formerly the F.F. Dailey tract, as described in a Deed recorded in Deed Book 282, Page 223, Dare County Registry; the said beginning point being also located on a course of North 58 deg. 39 min. 54 sec. West 79.14 feet from North Carolina Grid Station "School", having coordinates of N 568, 950.40, E 3028, 552.94; thence from the beginning point and along the East boundary of the lands of the Dare County Board of Education North 11 deg. 42 min. 07 sec. West 549.28 feet to an iron pipe or other marker located and being in the Southwest corner of the lands of Jera Associates; thence cornering and along the South Boundary of the lands owned by Jera Associates, Elpis Sakaria, Raj Alexander Trust and Jack A. Hillman North 78 deg. 17 min. 53 sec. East 476.87 feet to an iron pipe located in the Southeast corner of lands of Elpis Sakaria; thence cornering and along the West boundary of lands of the Dare County Board of Education South 11 deg. 42 min. 07 sec. East 49.24 feet to an iron pipe; thence cornering South 78 deg. 17 min. 53 sec. West 426.87 feet to a concrete monument located and being in the West boundary of the lands of the Dare County Board of Education known as the Cape Hatteras School Property; thence South 11 deg. 42 min. 07 sec. East 504.16 feet along the West boundary of the lands of the

Dare County Board of Education to an iron pipe located and being in the North margin of the right-of-way of North Carolina Highway Number 12; thence cornering and along the North margin of the right-of-way of North Carolina Highway Number 12 South 83 deg. 00 min. 53 sec. West 50.17 feet to the point and place of beginning.

Further; and

4. The Clerk of Superior Court of Dare County shall disperse the deposit made in each of the actions by the Plaintiff pursuant to G.S. 40A-41 to each of the Defendants as a credit upon the amount of compensation to be determined and provided by law; and

5. This matter is retained on the docket for trial as to the issue of just compensation.

6. Each of the parties shall pay their own costs in this action.

This Judgment is entered out of Court and out of term pursuant to G.S. 40A-47 and agreement of the parties in the hearing of this matter, and corrected pursuant to Rule 60 (a) of the Rules of Civil Procedure.

This 25th day of May, 1994.

/Jerry R. Tillett
Superior Court Judge

**APPENDIX D**

SUPREME COURT OF NORTH CAROLINA

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
ELPIS SAKARIA
Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
RAJ ALEXANDER TRUST, Elpis J.G.B. Sakaria, Trustee
Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
JERA ASSOCIATES, a Maryland Partnership
Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
JACK HILLMAN and wife, LILLIAN HILLMAN

ORDER

Upon consideration of the petition filed by Defendants in this matter for rehearing of the decision of this Court pursuant to Rule 31, N.C. Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 3rd day of April 1996.

S/Orr, J.
For the Court"

No. 229A95 FIRST DISTRICT

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of April 1996.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

Marvea J. Francis
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Norman W. Shearin, Jr., Attorney at Law, For Sakaria et al
Mr. Robert L. O'Donnell, Attorney at Law, For Dare County
Mr. Christopher R. Hedrick, Attorney at Law, For Dare County
Mr. Ronald E. DeVeau, Attorney at Law, For Dare County
Mr. W. Brian Howell, Attorney at Law, For Dare County
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
Mead Data Corporation
Shephard's McGraw-Hill

No:COA94-739

FIRST DISTRICT

North Carolina Court of Appeals

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,

Plaintiff

v.

ELPIS SAKARIA, RAJ ALEXANDER TRUST, Elpis J.G.B. Sakaria, Trustee, JERA ASSOCIATES, a Maryland Partnership, JACK HILLMAN and wife, LILLIAN HILLMAN,

Defendants

## ORDER

Petition for Rehearing to review the decision of the North Carolina Court of Appeals filed on the 2nd day of May 1995 was denied by order of the North Carolina Supreme Court on the 3rd day of April 1996, and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Dare County North Carolina that the North Carolina Supreme Court has denied the Petition for Rehearing filed by the Defendants in this cause.

WITNESS my hand and official seal this the 11th day of April 1996.

/s/
John H. Connell
Clerk, North Carolina Court of Appeals

/s/
Deputy Clerk,
North Carolina Court of Appeals

Orig. to CSC
Copy to:
Mr. Norman W. Shearin, Jr., For Sakaria, et al
Robert L. O'Donnell
R. Gregory McNeer, Jr.
Mr. Thomas L. White Jr., Attorney at Law, For Dare Cty Board of Ed
Ronald E. Deveau

## APPENDIX E

United States Constitution, article I:

SECTION 8. The Congress shall have power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the Supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling for the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—

And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * * * * * *

SECTION 10. No State shall enter into any treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the

net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

United States Constitution, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## APPENDIX F

33 United States Code § 1344(a):

§ 1344. Permits for dredged or fill material

*(a) Discharge into navigable waters at specified disposal sites*

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * * * * * * *

*(d) "Secretary" defined*

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

North Carolina General Statutes, Section 115C-517 (1995):

*§ 115C-517 Acquisition of sites.*

Local boards of education may acquire suitable sites for schoolhouses or other school facilities either within or without the local school administrative unit; but no school may be operated by a local school administrative unit outside its own boundaries, although other school facilities such as

repair shops, may be operated outside the boundaries of the local school administrative unit. Whenever any such board is unable to acquire or enlarge a suitable site or right-of-way for a school, school building, school bus garage or for a parking area or access road suitable for school buses or for other school facilities by gift or purchase, condemnation proceedings to acquire same may be instituted by such board under the provisions of Chapter 40A of the General Statutes, and the determination of the local board of education of the land necessary for such purposes shall be conclusive.

**APPENDIX G**

DARE COUNTY BOARD OF EDUCATION, a body of politic and corporate,
Plaintiff,
v.
Elpis SAKARIA, Defendant.
DARE COUNTY BOARD OF EDUCATION, a body of politic and corporate, Plaintiff,
v.
RAJ ALEXANDER TRUST, Elpis J.G.B. Sakaria, Trustee, Defendant.
DARE COUNTY BOARD OF EDUCATION, a body of politic and corporate, Plaintiff,
v.
JERA ASSOCIATES, a Maryland Partnership, Defendant.
DARE COUNTY BOARD OF EDUCATION, a body of politic and corporate, Plaintiff,
v.
Jack HILLMAN and his wife, Lillian Hillman, Defendants.

No. 229A95.

Supreme Court of North Carolina.

July 27, 1995.

Norman W. Shearin, Jr., Kitty Hawk, for Sakaria, et al.

Robert L. O'Donnell, Norfolk, VA, Christopher R. Hedrick, Newport News, VA, Ronald E. DeVeau, Manteo, for Dare County.

Prior report: 118 N.C.App. 609, 456 S.E.2d 842.

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by Defendants in this matter pursuant to G.S. 7A-30 (substantial constitutional question), the following order was entered and is hereby certified to the North Carolina Court of Appeals: the notice of appeal is

"Retained by order of the Court in conference, this the 27th day of July 1995."

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 14(d)(1).

Defendants shall forthwith submit an appeal bond to this Court, as provided by Appellate Rule 17(b). The bond may be in cash or by a written undertaking with good and sufficient surety in the sum of $250.00.

Upon consideration of the petition filed by Defendants in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 27th day of July 1995."

**APPENDIX H**

DARE COUNTY BD. OF EDUCATION
v.
SAKARIA

No. 229A95.

Supreme Court of North Carolina.

Feb. 8, 1996.

Case below: 118 N.C. App. 609, 456 S.E.2d 842.

Motion by plaintiff to dismiss appeal for lack of substantial constitutional question denied 8 February 1996.